

No.

05-548 AUG 23 2005

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IN THE

SUPREME COURT OF THE UNITED STATES

RONALD DRAUGHON,

Petitioner,

v.

UTAH DEPARTMENT OF FINANCIAL
INSTITUTIONS and CAREER SERVICES
REVIEW BOARD,

Respondents.

**On Petition for Writ of Certiorari
To the Utah Court of Appeals**

**BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

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October 25, 2005

QUESTIONS PRESENTED

1. Whether the Utah State Supreme Court, Court of Appeals, and the Utah Career Service Review Board erred in law by failing to consider Petitioner's arguments under the Fourteenth Amendment that the Utah State Agency denied Petitioner a state-created liberty and property interest in his continued employment based upon mandatory language in state administrative rules which required placing a permanently disabled employee in a lesser suitable position when the employee was unable to perform the essential functions of his prior job.
2. Whether the Utah State Supreme Court, Court of Appeals, and the Utah Career Service Review Board erred in law by failing to hold that Petitioner was denied just compensation when the state agency removed him from a career state employment position, without cause, but rather to "advance the good of the public service," in violation of the Fourteenth Amendment of the United States Constitution.
3. Whether Utah Code 67-19-18(1)(a) (2000) is unconstitutional on its face and as applied as overbroad and vague in that it allows for the termination of a state career service employee without cause or fault.

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PETITION FOR WRIT OF CERTIORARI

Ron Draughon respectfully petitions this Court for review of a review by the Utah Supreme Court of decisions from the Utah Court of Appeals and the Utah Career Service Review Board entered in this case.

OPINIONS BELOW

The opinion of the Utah Court of Appeals affirming the decision of the State of Utah Career Service Review Board is reported at *Draughon v. Dep't of Fin. Insts.*, ____ P.3d ____ (Utah App. 2005); 2005 UT App 44; 2005 Utah App. LEXIS 45 and reprinted in the Appendix hereto at Pet. App. 1-4. The Order and the Notice of the Utah Supreme Court denying the Petition for Writ of Certiorari for a review of the above case is reprinted in the Appendix hereto at Pet. App. 58-59. The Amended Statement of the Issues, Findings of Fact, Conclusions of Law and Decision of the State of Utah Career Service Review Board, dated June 4, 2002 is reprinted in the Appendix hereto at Pet. App. 5-32. The Decision and Final Agency Action of the State of Utah Career Service Review Board, dated June 19, 2003 is reprinted in the Appendix hereto at Pet. App. 33-57.

STATEMENT OF JURISDICTION

A written judgment and order was entered by the Utah State Court of Appeals on February 3, 2005. A petition for a writ of certiorari was timely filed and considered by the Utah Supreme Court. That petition was denied on May 26, 2005 and the notice of entry was filed and the decision was mailed out to counsel on May 31, 2005. This Petition is filed with 90 days of the entry of the final decision from the Utah State

Supreme Court. This appeal raises only federal Constitutional questions under the Fourteenth Amendment of the United States Constitution and is based upon the Utah Courts' failure to consider such claims. The State of Utah is a party and the Utah State Attorney General is counsel for the Respondents.



DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

1. United States Constitution, Amendment 14, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State Deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Utah Code Annotated § 67-19-18(1)(a) (2000):

(1) Career service employees may be dismissed or demoted:

(a) to advance the good of the public service; or

(b) for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office.

(2) Employees may not be dismissed because of race, sex, age, disability, national origin, religion, political

affiliation, or other nonmerit factor including the exercise of rights under this chapter.

(Emphasis added).

3. Utah Administrative Code R. 477-2-4(4)(e)(ii) (2000)

(ii) Employees with disabilities who are unable to perform essential job duties because of impairments will be provided reasonable accommodations to perform essential job duties. (Emphasis added).

4. Utah Administrative Code R477-8-7(8)(a)(iv)(B)

(iv) Conditions for return from leave without pay shall include:

(B) If an employee is unable to perform the essential functions of the position because of a permanent disability, the obligation to place the employee in the same or similar position shall be set aside. The employing unit shall place the employee in the best available, vacant position for which he is qualified, if able to perform the essential functions of the position with or without reasonable accommodations. If the employing unit does not have an available position, the agency shall then attempt to place the individual. The new position shall be consistent with the employee's qualifications and capabilities.

(I) For the first year, every effort shall be made to find a position as close to the salary range and function as the original position.

- (II) The agency Executive Director may extend the timeline for return to work beyond one year if the employee's injury resulted in disability prohibiting the employee from performing the essential functions of the job, as defined by the ADA.

(Emphasis added).

STATEMENT OF THE CASE

Nature of Proceedings: This a petition for review of a review by the Utah Supreme Court of decisions from the Utah Court of Appeals and the Utah Career Service Review Board of a state agency action which terminated Petitioner, without cause, "to advance the good of the public service." A Career Service Review Board Hearing Officer rejected the constitutional claims asserted in this Petition and granted summary judgment to the state agency (The Department of Financial Institutions). The summary judgment was expressly not based upon "cause" or wrongful actions by Petitioner, but rather to "advance the good of the public service" under Utah Code § 67-19-18(1)(a) (2000). Petitioner continued to raise his Fourteenth Amendment claims that he was denied substantive and procedural Due Process of law as asserted in this Petition at every stage of these proceedings, even though they were summarily rejected or ignored.

Based upon Petitioner's motion to reconsider the Hearing Officer reinstated the case, but still rejected all federal constitutional claims. The Hearing Officer found in favor of Petitioner after a trial and ordered that the Agency had a mandatory obligation to place Petitioner in a suitable position

with reasonable accommodations under state rule R477-8-7(8)(a)(iv)(B) (2000).

On appeal to the Utah State Career Service Review Board (CSRB) the Hearing Officer's decision was reversed and the prior grant of summary judgment was reinstated. Again all constitutional claims were rejected. The Utah Court of Appeals never even addressed the federal constitutional claims even though the arguments were raised in substantial portions of Petitioner's briefs. The Utah Supreme Court then denied certiorari without comment.

Statement of Relevant Facts: Petitioner (Mr. Draughon) began working with the Utah Department of Financial Institutions (Agency) in 1980 and became a "career service" employee with rights to continued employment and medical and retirement benefits. In 1982 he was promoted to Deputy Supervisor of Banks, and in 1988 to the Supervisor of Savings and Loans. In early 1997, Mr. Draughon began seeing a psychiatrist for mental health treatment. By March 1999, the Agency agreed that Mr. Draughon's mental illness constituted a disability within the meaning of the *Americans with Disabilities Act* (ADA) and state law. Due to an extremely stressful job environment where Mr. Draughon's requests for accommodation were disregarded, together with other life stressors, he suffered a mental breakdown and went on long-term disability and leave without pay status from his then supervisory examiner position.

The Agency had a mandatory obligation to either offer Petitioner his previous position back if he could return within one year or find another position in which he could perform if unable to perform the "essential functions" of his previous position under Utah Adm. Rule, R477-8-7(8)(a)(iv)(B) (2000). This one year period was extended, as allowed by R477-8-7(8)(a)(iv)(B)(II) on May 16, 2000 and Petitioner continued on his same leave without pay status until he was terminated on October 20, 2000.

On October 18, 2000, in response to a "Notice of Intent to Terminate Letter," Mr. Draughon became aware of and brought to the Agency's attention its obligation to place him in another lower level position "with or without reasonable accommodations" rather than terminate his employment since he could not perform the essential functions of his previous supervisory position. The Agency rejected this obligation and terminated Mr. Draughon's twenty-year career service employment even though it had at least three lower level examiner positions in which it could have attempted to place Mr. Draughon. The Agency never made any attempt to notify Mr. Draughon of his right to be placed in a lower level position with or without reasonable accommodations. Instead, it offered Mr. Draughon an even more difficult job to return to work in where he was required to "take up the full spectrum of responsibilities" of that position. Mr. Draughon was never compensated by the state for the loss of his career service position even though his termination was without cause and due only to his recognized disability. To the contrary he lost his ability to obtain thousands of dollars in vested retirement benefits and in continued state medical insurance in addition to lost salary. The Utah Court of Appeals upheld the termination of Mr. Draughon, without cause, "to advance the good of the public service." No other state employee in Utah had ever been terminated "to advance the good of the public service" as the sole basis of the state action.



ARGUMENT IN SUPPORT OF WRIT

It is always a grievous loss when the seemingly unlimited powers of the state take away the liberty or property interests of innocent citizens without compensation and absent a showing of any fault by the citizen. State courts often do not have the day-to-day experience in applying constitutional principles and, as a result, important constitutional rights are overlooked and not taken seriously even though United States

Supreme Court precedents and other federal Courts of Appeal precedents clearly establish such rights. Such is the case in this Petition: Utah Appellate Courts have little or no experience in applying federal law as it relates to state-created liberty and property interests based upon mandatory language in state policies nor are they familiar with providing just compensation for losses of private property or liberty interests which are taken to serve some general public interest.

In this case, Petitioner has suffered a grievous loss in his right to continued employment, medical insurance benefits, and state retirement funds because the state failed to apply Fourteenth Amendment case law regarding state-created liberty and property interests and the need to provide just compensation even for a taking of private property. The state further failed to see a Fourteenth Amendment violation in taking Petitioner's career merit employment without "just cause" or the finding of any fault on the part of Petitioner. Utah did not have to create liberty and property interests in continued state employment for disabled employees, but once they did, using mandatory language, they cannot avoid application of federal constitutional principles.

The failure to apply Fourteenth Amendment principles to law-abiding citizens stems largely from a mis-application of precedents of this Court. This Court should grant this Petition to avoid continued deprivation of constitutional rights by state courts.

In this case there was admittedly no wrongful action or inaction on the part of Mr. Draughon and, therefore, no just cause for his termination. Instead a novel and new ground was relied upon which resulted in a permanently disabled employee being terminated to "advance the good of the public service." This Court is the last hope to remedy Mr. Draughon's constitutional deprivation. However, this Court should grant certiorari or summarily reverse the Utah Appellate Court decision because of the impact it will have on clarifying that

law-abiding citizens should not have to suffer a loss of liberty or property to advance some public interest without compensation and to clarify that mandatory language in state personnel rules presumptively creates a liberty or property interest protected by the Fourteenth Amendment of the United States Constitution.

I. STATE COURTS ARE LIKELY TO FAIL TO APPLY FOURTEENTH AMENDMENT PRINCIPLES TO STATE-CREATED LIBERTY AND PROPERTY INTERESTS DUE TO A MISUNDERSTANDING OF THIS COURT'S DECISION IN *SANDIN v. CONNER*.

This court has long held that mandatory language in state rules and statutes may create liberty and property interests which cannot be taken from a state employee without "just cause." See generally *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972). However, Utah Appellate Courts and other state appellate courts throughout the country have not generally acknowledged Fourteenth Amendment protection stemming from mandatory language in state rules and policies. (Indeed, state courts are loathed to find any rule or policy unconstitutional in that Utah, like other states, presumes state rules are constitutional and will seek an interpretation or application that avoids finding a constitutional infirmity.) Failure to apply the "state-created liberty" principle by state courts is likely a result of mis-application and interpretation of cases in the prisoner context which hold that mandatory language in prison policies cannot create a right under the purview of the Fourteenth Amendment absent a showing that a prisoner has suffered from an atypical loss of his liberty not generally associated with his conditions of confinement. See *Sandin v. Conner*, 515 U.S. 472, 481-84 (1995). Although *Sandin* was a corrections case, it may have the inadvertent effect of causing state courts to make it virtually impossible to find a state-created liberty or property interest in the policies